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CENTRAL ADMINISTRATIVE TRIBUNAL  
PRINCIPAL BENCH  
(JUDICIAL)

61/35, Copernicus Marg, New Delhi.

Dated: 11/11/2013

From:

The Principal Registrar  
Central Administrative Tribunal  
Principal Bench, New Delhi.

To,

✓ Mrs. Harvinder Oberoi, counsel for the applicant, CAT Bar New Delhi.

2 Shri Anil Kumar Singh, counsel for the respondents, P/P-32, Maurya Enclave, Pitampura, Delhi-110034.

O.A. No. 1845/2012

Sh. Jai Singh .....

Applicant

Versus

M/o Statistics & Programme Implementation & Ors .....

Respondent

Sr.

I am directed to forward herewith a copy of Judgment /Orders dated 01/11/2013  
passed by this Tribunal in the above mentioned case for information and necessary  
action.

Please acknowledge the receipt.



Yours faithfully,

Bjay  
11/11/13

Section Officer, (Judl.)  
For Principal Registrar

**Central Administrative Tribunal  
Principal Bench, New Delhi**

O.A.No.1845/2012

Friday, this the 1<sup>st</sup> day of November 2013

**Hon'ble Mr. A.K. Bhardwaj, Member (J)**  
**Hon'ble Mr. P.K. Basu, Member (A)**

Jai Singh s/o Bahori Singh  
r/o P.No.B-1/62  
Raj Inclave, Sector 5  
Rajendra Nagar, Sahibabad  
Ghaziabad (UP)

.. Applicant

(By Advocate: Mrs. Harvinder Oberoi)

Versus

✓ 1. Ministry of Statistics & Programme Implementation  
Through its Secretary  
Sardar Patel Bhawan  
Sansad Marg, New Delhi-1

Dy. Acc. 80  
C.R. Unit  
13.11.13

2. Ministry of Personnel, Pension & Public Grievances  
Through its Secretary  
Department of Personnel & Training  
North Block, New Delhi

3. Union Public Service Commission  
Through its Chairman  
Shahjahan Road, New Delhi

.. Respondents

(By Advocate: Shri Anil Kumar Singh)

**ORDER (ORAL)**

**Mr. A.K. Bhardwaj:**

The applicant joined the service in Ministry of Statistics & Programme Implementation as Statistical Investigator w.e.f. 5.3.1984. Consequent upon formation of Subordinate Statistical Service on the basis of recommendations of 5<sup>th</sup> Central Pay Commission (CPC), he was absorbed/appointed as Statistical Investigator Grade III in the pay scale of Rs.5500-9000 under four-grade structure of the newly constituted Service

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w.e.f. 1.4.2004. After the recommendations of 6<sup>th</sup> CPC, the four-grade structure of Statistical Service was reconstituted and squeezed to two grades in the following manner:

Sl.No.	Prior to 6 <sup>th</sup> CPC Service Structure	As per 6 <sup>th</sup> CPC recommendations w.e.f. 01.01.2006 vide O.M. dated 05.08.2008 issued by MoS&PI.
(i)	Statistical Investigator Grade-I (Non-Functional) (Pay Scale Rs.7450-11500)	Statistical Investigator Grade-I (Pay Band-2, Rs. 9300-34800, Grade Pay Rs.4600) (Annexure-I).
(ii)	Statistical Investigator Grade-II (Functional) (Pay Scale Rs.6500-10500)	
(iii)	Statistical Investigator Grade-III (Non-Functional) (Pay Scale Rs.5500-9000)	Statistical Investigator Grade-II (Pay Band-2, Rs. 9300-34800, Grade Pay Rs.4200)
(iv)	Statistical Investigator Grade-IV (Functional) (Pay Scale Rs.5000-8000)	

As a result, the post occupied by the applicant was re-designated as Statistical Investigator Grade II w.e.f. 1.1.2006. He was given *ad hoc* promotion as Statistical Investigator Grade I in terms of the order dated 30.1.2009 (Annexure A-3).

2. The grievance of the applicant in the present Original Application is that the respondents could not finalize the amendment in the Recruitment Rules for the post of Statistical Investigator Grade I and could delay his promotion, thus he has sought issuance of directions to the respondents to frame the Recruitment Rules expeditiously and to regularize him as Statistical Investigator Grade I from the date of his *ad hoc* promotion, i.e., 30.1.2009.

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3. Mrs. Harvinder Oberoi, learned counsel for applicant submitted that though there are 1568 sanctioned posts of Statistical Investigator Grade I and only 1044 incumbents are in position, the respondents have not taken any steps to convene the regular Departmental Promotion Committee (DPC) to consider the applicant and other similarly situated persons for their regular promotion. Such factual position is not denied on behalf of the respondents. Mr. Anil Kumar Singh, learned counsel for respondents submitted that since the Union Public Service Commission (UPSC) had advised the Department not to make regular promotion to the post of Statistical Investigator Grade I till the finalization of amendment in the Recruitment Rules proposed after the recommendations of 6<sup>th</sup> CPC, the Department had no option but to wait for notification of the amended Recruitment Rules. He also produced a copy of the amended Recruitment Rules, i.e., Subordinate Statistical Service Rules, 2013. Mr. Singh submitted that the seniority list of Statistical Investigator Grade II is still provisional and not yet finalized.

4. We have heard the learned counsels for the parties and perused the material placed on record.

5. With the issuance of notification of the amended Recruitment Rules, the prayer made in clause 8 (A) of the Original Application stands granted to the applicant and only left out grievance is that he is not yet considered for regularization with effect from the date of his *ad hoc* promotion, i.e., 30.1.2009. It is settled position of law that a post need to be filled up in accordance with the Recruitment Rules *in vogue* at the time of occurrence of vacancy. The view taken by the Hon'ble Supreme Court in Y.V.



**Rangaiah & others v. V.J. Sreenivasa Rao & others, (1983) 3 SCC**

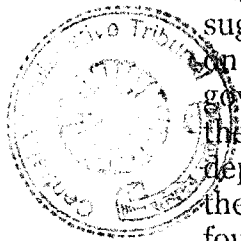
284 in this regard reads as under:-

“9. Having heard the counsel for the parties, we find no force in either of the two contentions. Under the old rules a panel had to be prepared every year in September. Accordingly, a panel should have been prepared in the year 1976 and transfer or promotion to the post of Sub-Registrar Grade II should have been made out of that panel. In that event the petitioners in the two representation petitions who ranked higher than the respondents Nos. 3 to 15 would not have been deprived of their rights of being considered for promotion. The vacancies which occurred prior to the amended rules would be governed by the old rules and not by the amended rules. It is admitted by counsel for both the parties that henceforth promotion to the post of Sub-Registrar Grade II will be according to the new rules on the zonal basis and not on the Statewide basis and therefore, there was no question of challenging the new rules. But the question is of filling the vacancies that occurred prior to the amended rules. We have not the slightest doubt that the posts which fell vacant prior to the amended rules would be governed by the old rules and not by the new rules.”

6. In **Sunil Kumar Mehra v. M.C.D. & another** (W.P. (C) No.2059/2012) decided on 8.5.2013, the Hon'ble High Court of Delhi has held as under:-

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(ii) Office Memorandum dated December 14, 2000 issued by DoPT which emphasizes that the time-frame stipulated in the Model Calendar needs to be strictly adhered to and in case of the prescribed time-frame not being maintained, steps should be taken to fix responsibility for the lapse; and (iii) judgment rendered by a Division Bench of this Court in W.P. (C) No.5549/2007 titled as 'Dr. Sahadeva Singh v Union of India & Ors' decided on February 28, 2012 wherein it was held that in the absence of any rules to the contrary, the OMs issued by DoPT on a subject, from time to time, including the OM suggesting the Model Calendar for holding DPCs become applicable on the government departments; it is therefore obligatory on the government departments to adhere to the time schedule laid down in the Model Calendar and where no explanation is given by the department for not convening the DPC within the time stipulated in the Model Calendar or the explanation given by the department is not found acceptable, the employees should not be made to suffer on account of inaction or delay on the part of the department in convening the DPC.



20. On April 12, 2013, a Division Bench of this Court, of which one of us namely, Pradeep Nandrajog J. was a member of, had decided a batch of writ petitions, lead matter being WP (C) No.8102/2012 UOI & Anr. vs. K.L Taneja & Anr. on the subject as to when can a person be granted promotion from a retrospective date. The Bench had noted various decisions of the Supreme Court on the point as under:-

- (i) 1987 (4) SCC 566 K. Madhavan & Anr vs. UOI & Ors.
- (ii) 1989 Supp (2) SCC 625 Union of India & Ors v K.K. Vadera & Ors
- (iii) 1995 (4) SCC 246 Vinod Kumar Sangal vs. UOI & Ors.
- (iv) 1998 (7) SCC 44 Baij Nath Sharma vs. Hon'ble High Court & Jodhpur & Ors
- (v) AIR 2004 SC 255 P.N. Premachandran vs. The State of Kerela & Ors
- (vi) AIR 2004 SC 3460 Sanjay K. Sinha & Ors v State of Bihar & Ors
- (vii) 2006 (13) SCALE 246 State of Uttaranchal & Ors vs. Dinesh Kr. Sharma
- (viii) 2008 (14) SCC 29 Nirmal Chandra Sinha vs. UOI & Ors.
- (ix) 2010 (4) SCC 290 UOI & Anr. vs. Hemraj Singh Chauhan

21. The Bench had held that the cornucopia of case law noted above brings out the position:-

- (i) Service Jurisprudence does not recognize retrospective promotion i.e. a promotion from a back date.
- (ii) If there exists a rule authorizing the Executive to accord promotion from a retrospective date, a decision to grant promotion from a retrospective date would be valid because of a power existing to do so.
- (iii) Since mala fides taints every act, requiring a person wronged to be placed in the position but for the mala fide or tainted exercise of power, *promotion* from a retrospective date can be granted if delay in holding DPC is attributed to a mala fide act i.e. deliberately delaying holding DPC with the intention to deprive eligible candidates the right to be promoted.
- (iv) If due to administrative reasons DPC cannot be held in a year and there is no taint of malice, no retrospective promotion can be made.

22. From a perusal of the claim of the petitioner, we find that the issue of seniority is actually a non-issue because even if the petitioner



were to be given promotion from a retrospective date his seniority would be the same because the person above him Sh.Shamsher Singh was a directly recruited Additional Town Planner as of the year 1994. What the petitioner is actually fighting for is ad-hoc service as an Additional Town Planner to be counter as regular service so that he becomes eligible to be promoted as a Chief Town Planner, the Recruitment Rules whereof require 8 years regular service as an Additional Town Planner as the eligibility norm.

23. What is meant by 'malice'?

24. Malice is of two kinds – one, 'Malice in Fact' and two, 'Malice in Law'. 'Malice in fact' is ill-will or spite towards a party and any indirect or improper motive in taking an action. 'Legal Malice' or 'Malice in Law' means '*something done without lawful excuse*'. In other words, 'it is an act wrongfully done without reasonable or probable cause, and not necessarily an act done from ill-will or spite'. (See the decision of the Supreme Court reported as S.R. Venkataraman vs. Union of India AIR 1979 SC 49)

25. Let us recap the basic facts which are as follows:-

(a) A vacancy had arisen to the post of Additional Town Planner on July 01, 2007, on which date the petitioner, who was working as a Junior Town Planner was eligible to be considered for promotion to the post of Additional Town Planner.

(ii) On January 07, 1998 the petitioner was promoted to the post of Additional Town Planner on 'ad-hoc basis'.

(iii) On September 06, 2006 the Director (Personnel), MCD prepared a note regarding promotion of the petitioner to the post of Additional Town Planner on 'regular basis'.

(iv) After a period of over 9 long years, on November 21, 2007 MCD convened a DPC for considering name of the petitioner to be promoted as an Additional Town Planner pertaining to the vacancy for the year 1997.

(v) On February 26, 2008 the petitioner was promoted to the post of Additional Town Planner on 'regular basis'.

26. From the above-noted cauldron of facts, one question which stares us in the face is that: What was the MCD doing regarding convening of DPC for making promotion to the post of Additional Town Planner for the vacancy year 1997 for the period from July 01, 1996 i.e. the date when the vacancy had arisen till September 06, 2006 when the Director (Personnel), MCD prepared a note for convening a DPC?

27. The reply filed by the MCD is stunningly silent. In spite of copious pleadings made by the petitioner that in spite of various

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representations sent by him and there being no impediment, officers of MCD kept on sleeping and thereby deprived him the benefit of a regular service as an Additional Town Planner, nothing in word has been spoken of by MCD, except that there were administrative reasons for the delay, an expression used by the Corporation in its letter dated August 21, 2007, but what were the facts constituting the administrative reasons have not been stated.

28. MCD was under a legal duty to convene a DPC to make promotion to the post of Additional Town Planner in respect of the vacancy year 1997 because a vacancy arose on July 01, 1996 when Mr. Ashok Kumar Khanna superannuated a day prior. MCD did not do the needful but waited for 9 long years to convene the DPC in question. The action of MCD of delaying the convening of DPC in question for a period of 9 long years without there being any lawful excuse for same amounts to 'Malice in Law'.

29. As held in K.L. Taneja' case (supra), retrospective promotion can be made in a case where the DPC was not held at the required time and such delay is attributable to 'malice'. Since in the instant case, we have held that the delay of 9 years caused by MCD in convening DPC in question is attributable to 'malice in law', the petitioner is entitled to be promoted to the post of Additional Town Planner from a retrospective date, which in the present case would be January 07, 1998 i.e. the date when the petitioner was promoted to the post of Additional Town Planner on ad-hoc basis.

30. There is another side to the present matter.

31. It is well settled legal position that where an incumbent is initially appointed to a post as per the applicable Rules, whether on ad-hoc basis or otherwise and is later on regularly promoted to said post, his seniority to the said post has to be reckoned from the date of his initial appointment and not from the date of his confirmation/regularization. However, where the initial appointment is not made as per the Rules but is only a stop-gap arrangement, the period of officiation in such post cannot be taken into account for determination of seniority.

32. In the instant case, it is not in dispute that the ad-hoc promotion of the petitioner to the post of Additional Town Planner was in terms of the applicable Recruitment Rules. In view of above legal position, it has to be held that the seniority of the petitioner on the post of Additional Town Planner has to be reckoned from the date of his ad-hoc appointment to the said post. As a necessary corollary thereof, the ad-hoc service rendered by the petitioner on the post of Additional Town Planner shall be counted towards his regular service on the said post.

33. As regards the office memorandum dated April 10, 1989, the same would be applicable if DPCs are held as required by the office

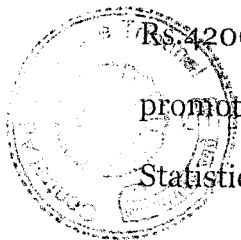
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memorandums noted by a Division Bench of this Court in Dr.Sahadeva Singh's case (supra).

34. In view of above discussion, we allow the present petition and hold that the date of promotion of the petitioner to the post of Additional Town Planner be treated as January 07, 1998 i.e. the date when the petitioner was promoted to said post of ad-hoc basis; the seniority of the petitioner on the post of Additional Town Planner should be reckoned from the date of his ad-hoc appointment to said post and the ad-hoc service rendered by the petitioner on the post of Additional Town Planner shall be counted towards his regular service on the said post."

6. When the respondents had 524 vacant posts of Statistical Investigator Grade I since 12.11.2008, they could have processed to fill up the same in accordance with the Recruitment Rules *in vogue*. Nevertheless, since the UPSC advised the Department not to fill up the vacancies till amendment in the Recruitment Rules, a conscious decision could be taken in this regard. The applicant did not work out his right for regular appointment as Statistical Investigator Grade I in accordance with the existing Recruitment Rules rather he also honored the view taken by the respondents and chose to file the present Original Application seeking issuance of direction to the respondents to frame the Recruitment Rules expeditiously or within a timeframe. In this way, he succumbed to the process initiated by the respondents to amend the Recruitment Rules as well as also the view taken by them not to fill up the available vacancies till finalization of the amended Recruitment Rules. However, by now, the amended Rules have been notified and in terms of Schedule II to the said Rules, Statistical Investigator Grade II in Pay Band-2 Rs.9300-34800 with Grade Pay of Rs.4200/- with five years regular service in the grade is eligible for promotion to the said post. Apparently, the applicant was re-designated as Statistical Investigator Grade II in terms of O.M. No.12039/1/2008-SSS



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dated 5.9.2008 w.c.f. 1.1.2006, thus he completed the required length of service of five years even after the O.M. dated 5.9.2008, i.e., on 5.9.2013. For easy reference, the relevant Schedule II of the Rules is extracted hereinbelow:-

"Schedule II

[See Rule 6(2)]

The method of recruitment, field of selection for promotion or absorption and the minimum qualifying service in the lower grade or grades for promotion or absorption to Group "B" duty posts of Subordinate Statistical Service (SSS).

S.No.	Name of post	Method of Recruitment	Field of Selection and minimum qualifying service for promotion
1.	Statistical Investigator Grade I	<p>100% by promotion as under:-</p> <p>(i) 70% vacancies to be filled by promotion on Selection basis;</p> <p>(ii) 30% vacancies to be filled on the basis of Limited Departmental Competitive Examination (LDCE), failing which by promotion on Selection basis. LDCE to be conducted by the Ministry of Statistics and Programme Implementation as specified in Scheduled- VI.</p> <p>Provided that no departmental examination shall be held and the post shall be filled 100% by promotion till all the incumbents holding post of Statistical Investigator Grade-11 with combined regular service of ten years or more in Grade II in PB-2. Rs. 9300 - 34800 with Grade Pay of Rs. 4200 and in the erstwhile Grade III (pre-revised scale of Rs. 5500 - 9000) and in the erstwhile Grade IV (pre-revised scale of Rs. 5000 - 8000) on the date of</p>	<p>(1) For promotion on selection basis:</p> <p>(i) Statistical Investigator Grade-II in PB-2. Rs. 9300-34800 with Grade Pay of Rs. 4200 with five years regular service in the grade;</p> <p>(ii) Statistical Investigator Grade-II in PB-2. Rs. 9300-34800 with Grade Pay of Rs. 4200 with combined regular service of live years or more in Grade II in PB-2, Rs. 9300-34800 with Grade Pay of Rs. 4200 and in the erstwhile Grade - III (pre-revised scale of Rs. 5500- 9000 ) and in the erstwhile Grade IV (pre-revised scale of Rs. 5000 - 8000 ).</p> <p>(2) For promotion on the basis of LDCE:</p> <p>Statistical Investigators Grade-11 in PB-2, Rs.9300-34800/-with Grade Pay of Rs. 4200</p>

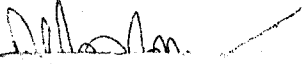
		commencement of these rules are considered for promotion to the post of Statistical Investigator Grade-I. Thereafter, the post shall be filled by the above method of recruitment.	with 5 years regular service in the grade and have completed the probation successfully shall be eligible for Limited Departmental Competitive examination.
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7. It is also not in dispute that after his appointment in service as Statistical Investigator, the applicant never earned any regular promotion and he could progress in his service career by way of re-designations only. In normal course, the respondents ought to have filled the available vacancies in accordance with the Recruitment Rules *in vogue* at the time when vacancies became available and only such course could be magnanimous. It is also noted that the recommendations of 6<sup>th</sup> CPC were implemented on 5.9.2008 and the incumbents of the post in different grades in Subordinate Statistical Service were re-designated on said date, thus the respondents had enough time to finalize the seniority list and this cannot be a ground to deny regular promotion to the applicant.

8. In the existing circumstances, the direction, we can take, is that if the *ad hoc* promotion of the applicant made in terms of O.M. No.12011/2/2010-SSS dated 30.1.2012 was made after following the procedure prescribed in the Recruitment Rules *in vogue*, then he would be deemed regular promotee from the date of his *ad hoc* promotion, otherwise the respondents would convene a regular DPC within four weeks from the date of receipt of a copy of this order and consider him for his regular promotion. In case the meeting of the DPC is delayed for any reason and held after retirement of the applicant, he would not be denied regular promotion on the ground that the retired government servants are though

considered for promotion but are not given actual promotion and in the event of being found fit, he would be entitled to his regular promotion from the date of expiry of four weeks from the date of receipt of a copy of this order.

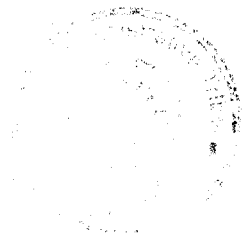
9. Original Application is disposed of accordingly. No costs.



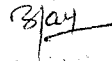
( P.K. Basu )  
Member (A)

( A.K. Bhardwaj )  
Member (J)

November 1, 2013  
/sunil/



Free Copy UAT of CAT  
(Procedure No. 1845/2012)  
प्रति नमूना प्रतिलिपि  
CEAT/1845/2012  
दिनांक/Date: 11/11/13



केन्द्रीय प्रशासनिक न्यायालय  
Central Administrative Tribunal  
मुख्य शाखा, नई दिल्ली  
Principal Branch, New Delhi